(4)

A

DEFENCE

OF THE

PRINCIPLES of INSURANCE

Advanced in

The CASE of the

MILLS FRIGATE.

ADVERTISEMENT.

THE publication of the Caſe of the Mills Frigate having been cenſured by the underwriters as exceedingly improper, *as it might tend to prejudice the minds of thoſe who might be called to ſerve on ſome future juries*; the Defence of this Caſe may perhaps fall under the ſame cenſure.

If the diſpute between the owners and underwriters related merely to any doubtful matters of fact, which reſpected only this one particular trial, it might have been improper to prejudice the opinion of the publick by any ſpecious repreſentations of ſuch facts, and it is only in ſuch caſes that the above ſentiment is *truly* applicable. But the preſent enquiry relates principally to a matter of cuſtom, viz. *what warrantee is the aſſured underſtood to make the aſſurer.*

This important queſtion having been three times agitated in the courts, when the Caſe was publiſhed, could not ſeriouſly be ſuppoſed to be any ſecret, and the different reaſonings on it might as well be read by a thouſand people, as heard by five hundred. Beſides this, it is neceſſary to obſerve, that before the publication of our Caſe, there were ſome verbal repreſentations given in different companies of the circumſtances attending this cauſe; repreſentations *tending* at leaſt, if not intended, to prejudice the publick againſt both the characters and the cauſe of the owners. They think themſelves therefore fully juſtified in publiſhing their Caſe, as the faireſt method of removing any

ſuch ill impreſſions, as might have been made either through error, or deſign.

They had alſo another motive for this publication, a more powerful, as it was a more worthy one, viz. *The benevolent wiſh that all who have any inſurances to make, might be appriſed of the new dangers to which they are expoſed, and that they might conſider of the moſt proper means by which ſuch dangers may be prevented for the future.* If the conſequences of the point which is at preſent ſo reſolutely laboured by the underwriters on this ſhip, could not extend beyond this one particular caſe, the owners might long e'er this time have ſilently ſubmitted to their loſs, and have left it to the underwriters to ſay, if not now, at leaſt in ſome future calmer moment, whether they had acted that part which honour and juſtice demands.

But this conteſt does not concern merely the owners of this particular ſhip, it may in ſome ſenſe hereafter extend to every man who may have property at ſea to inſure, and the future well being of many valuable members of ſociety may depend on their knowing how they can be inſured, or how guard againſt the artful cavils, the nice diſtinctions by which others have ſuffered. And if only one honeſt man ſhould, in conſequence of their caſe, be ſaved from the deſtruction which might have attended him, by his fighting ſuch a point as this againſt any future powerful combination of underwriters through all the courts of law in the kingdom, the owners will conſider it as a pleaſing teſtimony to the neceſſity of their publiſhing their caſe, and an ample reward for the pains and expence which they have been, and ſhall be put to, in the ſupport of it.

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IF the general principles of inſurance on which the owners found their claims are juſt, it would be both an unneceſſary and an unpleaſing taſk to enter into a minute application of theſe principles, to the ſeveral objections which have been urged againſt them.

Quotations, and replies, the uſual ſtale modes of debate, are only of uſe to the ſuperficial reader, who perhaps, with all theſe helps, may not comprehend the general plan of reaſoning which is adopted: we ſhall therefore, in conducting our defence, only once now and then, by way of compliment to thoſe gentlemen who have honoured us with their remarks, make a few quotations from them, but principally reſt the merits of our cauſe on the following firſt principles of inſurance, which we apprehend will ſupply a full anſwer to all the objections which have been hitherto made againſt us, viz.

I. That

I. That neither cuſtom, equity nor law, as founded on common ſenſe, can require of the ſhip owner (if no judge of ſhips himſelf) to make any repairs on his ſhip, but ſuch as the captain, or ſhip builder, ſhall determine to be neceſſary for that voyage which ſhe is to undertake.

II. If they whoſe particular employment it is to examine or repair ſhips, have no ſuſpicions, or communicate none, that any defects attend them, the owners are juſtified in believing them to be ſea worthy.

III. If the owner gives orders to the captain, or ſhip builder, to do every thing which is *neceſſary*, the owners may juſtly conclude that they have *done all* which *ought* to be done.

IV. That if a ſhip has no ſymptoms of any decay, or internal defects, ſhe is never taken to pieces with a view of ſatisfying doubts which *never exiſted*.

V. That in the conſtruction of a ſhip there are ſo many various, but connected parts, each of which muſt be in perfect good condition to make her *abſolutely* ſea worthy, that a ſtrict examination of *ſome* of theſe parts, will not, cannot, certainly aſſure the builder that all the other parts, are as they ought to be, and that an examination of all the parts eſſential to ſea worthineſs cannot be made, unleſs the ſhip be taken to pieces.

VI. That

VI. That after a voyage is begun, if by any ways, or means whatever, any ſubſequent diſcovery of internal defects, ſhould to both parties unexpectedly ariſe; and in conſequence of this diſcovery, the voyage ſhould be overſet, and the intereſt totally loſt to the owners, the underwriter ought not to avail himſelf of this ex poſt facto evidence, ſo as to invalidate the previous fair contract, for if the ſhip would have been deemed by proper judges to be ſeaworthy at the very time when the aſſured made this contract with the aſſurer; the owner had in this caſe, as far as was in his power, rendered this ſhip a fair riſque for the underwriters.

VII. That there is no ſuch fundamental principle as this, *that the poſſibility of gaining the premium is the valuable conſideration for running the riſque, and that whenever this actual poſſibility does not exiſt, the obligation is no longer binding:* for in many inſurances there can be no *abſolute poſſibility* of gaining the premium, but often an *abſolute impoſſibility*, and therefore it can only be ſaid, that there ſhould be a poſſibility in the fair opinion and belief of the two contracting parties, who mutually give, and take a premium, as a ſuppoſed valuable conſideration for a riſque concerning which they are equally informed *.

VIII. If

* As an illuſtration of this better definition it was obſerved, *that a ſhip inſured in London on the 10th of June loſt or not loſt at and from Boſton to London, was a very good inſurance, notwithſtanding ſhe had been burnt in Boſton harbour nine days preceding the contract, and therefore there was in this inſtance, not an abſolute but a fairly preſumed poſſibility of gaining the premium.* The gentlemen who differ from us in our prin-

VIII. If then the underwriter takes this riſque from the aſſured under ſuch circumſtances as were known to both parties, it ought to be conſidered as a good inſurance, for the underwriter takes it, *as it then is*, not under any warrantee either expreſſed or underſtood, that defects *ſhall not hereafter* be diſcovered, but only warranting that NOW, at the time of making the contract,

principles have made many objections to this inſtance, and that reſpectable gentleman in particular, who has laboured ſo hard at our conviction, as by his own confeſſion, to have heartily tired *himſelf*, ſeems to imagine, by a paſſage in the concluſion of his work, that the above inſtance was mentioned, as being exactly ſimilar to the caſe of the Mills Frigate, whereas if the gentleman had duly conſidered this point, he muſt have immediately ſeen, that inſtead of his calling it *a mockery on mankind to make ſuch a compariſon*, that the ſevereſt reflection would be to miſtake it for any compariſon at all: for this inſtance was not mentioned as an illuſtration of our particular caſe, but only as an anſwer to a general principle which was too looſely defined. The exiſtence of the contract between the aſſured and the aſſurer cannot be dated from the time deſcribed in the policy, the aſſurer is reſponſible from ſuch a time to ſuch, but the *obligation*, the contract, by which he makes himſelf thus reſponſible, commences at *the very day* when the two contracting parties meet, and ſettle the terms of this contract. If then on the *very day* that the aſſured meets the aſſurer, and gives him a premium to be reſponſible for paying £ 100 on a ſhip, which ſhip is not in being on that *very day*, it is ſelf evident that this contract was made under ſuch *real*, though *unknown* circumſtances, as that one of the *contractors could not looſe*, and the other *could not win*, for though it was poſſible at a certain previous time when the deſcription of the riſque in the policy began, yet at the *time* of the underwriters ſigning this policy *which is the real commencement of the contract*, the underwriter in that moment of bargaining accepted of a ſuppoſed valuable conſideration which it was abſolutely impoſſible for him to gain, and therefore the above fundamental principle of an abſolute poſſibility of gaining the premium is improperly defined.

tract, he neither knows, nor believes that there are any *.

IX. That no other warrantee *than this* can be included under the word good ſhip uſed in policies, which is a word of courſe, and is uſed as ſuch in a variety of inſtances in the Engliſh language, rather as an expletive than as conveying any determinate ſenſe, and a word ſo unworthy of the ſtreſs which for this particular purpoſe is lain on it, that were it even to be taken under all the rigours of conſtruction, it can only mean that the owner *believes* her to be a good ſhip.

X. That common ſenſe muſt determine warrantees to be uſed under different reſtrictions, according to the different objects to which they are applied; a warrantee applied to caſks of liquor which may be taſted, or to a bale of goods which may be examined *without deſtroying* the peculiar nature, or quality of ſuch goods, muſt be abſolute, becauſe their real condition may be certainly known; but a warrantee of a ſhip's being good, can only imply, that ſhe appears, and is believed to be good, by that kind of examination which is uſually made.

* The firſt part of this principle is ſo ſelf-evident, that even a gentleman profeſſedly writing againſt our caſe inadvertently grants, "*That if the aſſured informs the aſſurer of* "*every circumſtance fairly and honeſtly, it ought to* BE DEEMED "A GOOD INSURANCE, *and that Meſſrs. Mills did inſure on* "*theſe principles there is not the leaſt doubt.*" So powerful is truth! So great the circumſpection neceſſary to avoid contradictions when defending an intricate cauſe!

XI. That if the owners by their own orders, or thoſe of their captain, cauſe either every repair to be made, or every other meaſure to be taken for the good of the intereſt, which would be thought prudent or neceſſary were they to be uninſured, the underwriters cannot expect that more than this ſhould be done, unleſs they expect, that the owners ſhould do more for the inſurers, than they would for themſelves.

XII. That as ſelf preſervation is the firſt law of nature, it is always to be concluded that any captain who is to go a *long* voyage in an heavy loaden ſhip, *would pry as much as poſſible* into the defects of his ſhip, even if he had no other inducement to it but that of preſerving his own life; and that every captain ſo well ſatisfied as to venture his life in a ſhip, muſt by this ſingle act of ſailing in her, ſhew that his opinion of her was good *.

It is on theſe general principles that the owners found the propriety of their claim. Principles ſo agreeable to all the natural ſentiments of juſtice and equity, ſo perfectly conſiſtent

* In ſome remarks on our caſe there is a very extraordinary paſſage which muſt certainly be falſe printed, *viz.* "*No doubt the captain acted for the beſt, and with a view to* "*the intereſt of his owners, not to pry into her defects too much,* "*and as he ventured his life in this ſhip, it muſt be ſuppoſed that* "*he did not ſuſpect the ſhip to be in ſo miſerable a condition as* "*ſhe afterwards turned out to be,*" i. e. He ventured his life becauſe he *did not ſee* the real condition of the ſhip; but *would not look narrowly* for fear *he ſhould ſee it*. If the above paſſage is not falſe printed, it was, perhaps, intended as a compliment to the captain, that he preferred the owners intereſt to his own life.

ſiſtent with all the expectations, which the very nature of the faireſt contract can permit one of the parties to form from the other, that in the two trials, in which the owners have obtained the verdict, both the juries were at once impreſſed with theſe natural ideas. They knew that in every work to be undertaken by man, there was a certain line, beyond which all prudence would be baffled, all labour ineffectual, and therefore moſt juſtly reaſoned, that when an owner *had done all that he ought to do*, and had reſigned his riſque with a premium annexed to it, to the underwriter, it then became his buſineſs, agreeable to his contract to be reſponſible for every thing that HAS, MAY, or SHALL HAPPEN TO THE SAID ADVENTURE.

And theſe firſt principles of inſurance are ſo agreeable to the general ſenſe and practice of the two inſurance companies, and that of the principal merchants and traders in the city of London, that this reſolute attempt to overſet them, and introduce ſome new refinements of law in their ſtead, cannot but fill the minds of merchants with very alarming apprehenſions: and that it does ſo, is witneſſed by an obſervation made by one of the laſt jury, a very eminent merchant and underwriter, to which all the other jurymen aſſented, *viz. that theſe principles of an owner's abſolute warrantee of ſufficiency, was carrying matters to ſuch extremes, that he began to be very ſeriouſly alarmed at the conſequences.* And alarming it muſt, and ought to be, to every gentleman who will attentively conſider to what a variety of fatal purpoſes theſe principles may, and probably will be applied.

This doctrine of the owner's abſolute warrantee of his ſhip's ſufficiency, involves in it the greateſt imaginable abſurdities and contradictions; it implies, that a man is bound at his peril to make *certain* and *abſolute* concluſions from *uncertain* and *precarious* premiſes: is bound to warrant concerning things from their *nature* periſhable, by their *ſituation* often inviſible, *that* which can only be truly warranted of things which cannot decay, and which can always be ſeen; and in ſpite of the fancied ſecurity from his policies on which he depends, is, at his own riſque, to ſtand the chance of events, which may ariſe from cauſes beyond the reach of human prudence either to ſuſpect, or prevent.

Is there not then, (it may be aſked) any way by which a merchant may be able to ſay that his property at ſea is inſured at all events, provided that he has taken all the prudent precautions which the wiſe, the cautious, the moſt honeſt men uſually take? No. As policies are at preſent interpreted, *no man can ever ſay that he is really inſured.* He may be ſo honeſt as to tell every thing he knows, ſo prudent as to order every uſual precaution to be taken againſt every ſuſpected danger, he may do every thing which the beſt judges even if intereſted in the concern themſelves would, or could have recommended; but notwithſtanding all theſe wiſe and honeſt precautions, he may be ruined by a ſuppoſed point of law being againſt him, and his prudence and honeſty be of no other uſe to him, than conciliating the eſteem and compaſſion of his creditors.

That theſe dangers are not imaginary, and that merchants every way worthy of the above

character

character have narrowly eſcaped this legal deſtruction, will appear from the following inſtance: The Carolina, captain Duncan, from London to Philadelphia, who after diſcharging her cargoe there, being put into dock (as it was her uſual time of repair, according to the cuſtom of that trade) was found ſo totally rotten, that there was no poſſibility of repairing her. This ſhip, though fitted out in the ſame manner as ſhips of the like age are uſually fitted, though ſhe was deemed ſuch an eligable adventure, that thoſe underwriters who could get moſt on her were moſt pleaſed, was notwithſtanding this, no object of complete inſurance, either on the ſhip, or on the goods; for if by ſtarting a plank, or any other accident ſhe ſhould have damaged the cargoe, and yet the ſhip not be totally concealed from an examination, ſhe muſt have appeared on the opening her planks to be in that rotten condition, which rendered a repair at any place, and under any circumſtances impoſſible. The ſubſequent proofs of her inſufficiency muſt have been ſuch as would have enabled the council for the underwriters to have harrangued with peculiar emphaſis, "*That a ſhip incapable is no ſhip at all: "that the owners knowledge or ignorance of theſe "circumſtances does not alter the caſe, that if ſhe thus "eventually appears incapable (from ſome latent in-"ternal defect) of performing her voyage, ſhe is, on "this account, incapable of being the ſubject of inſur-"ance, either on the body of the ſhip, or the goods*;" and if the rigorous interpretation of the law was to be ſtrictly purſued, not one freighter of this ſixty thouſand pound cargoe could have recovered his inſurance of the underwriters, but

muſt

muſt have had his remedy on the ſhip owners ſo far as they could have paid him, and ſat down without any relief for the deficiency.

It has been aſſerted that this reaſoning is adopted in the caſe with "*a view of occaſioning* "*the greater ferment, and to make the caſe of the* "*ſhip more lamentable, and that until ſuch a hard* "*caſe ariſes it is needleſs to enlarge upon it:*" This aſſertion proves how uſeful it would be to a trading nation, that the laws by which our property is to be determined were more generally known, and that whenever any new caſes ariſe they ſhould be made as publick as poſſible; for we find by the above paſſage, that a very important part of the law, with regard to inſurances, has ſo totally eſcaped the knowledge of a gentleman, both a merchant and an underwriter profeſſedly treating on this ſubject, that he even denies in effect the exiſtence of a fact by others too well known to be diſputed. That this argument was not thrown out to make the greater ferment, but to prove the neceſſity of altering both policies and bills of lading, will appear from this fact. An eminent merchant the freighter of goods, ſhiped on a general ſhip in America, tried this point with an underwriter lately deceaſed on this ſingle principle: *that the freighter was not reſponſible for the inſufficiency of the ſhip*; and on this *one principle*, without any other circumſtances whatever to affect the queſtion, the freighter was caſt, and the policy vacated; and if any gentleman ſhould wiſh to have any further ſatisfaction on theſe points, he may receive it by applying either to Richard Oliver, or Nicholas Tuite, Eſqrs. who were both of them freighters under the ſame circum-

circumſtances, and have neither of them recovered their inſurances.

Now though it ſhould be the general opinion, that this principle ought not to be extended to the freighters; yet, if this be law, is it not evident that whenever a loſs happens under theſe circumſtances, the freighter has no ſecurity from his policy under the preſent form, but that which ariſes from the mere honour of the underwriter? and though the majority of thoſe gentlemen might not perhaps ſhelter themſelves under the rigid conſtruction of a point of law, in oppoſition to the general opinion of every fair and honeſt trader; yet no man can be certain but *that ſome may do ſo*, and under many circumſtances it may be more for a freighter's intereſt to ſubmit patiently to his loſs, than to purſue the underwriter from one court to another, through new trials, demurrers, *&c. &c. &c.*

If it were permitted us to doubt, concerning the underwriters favourite plea (becauſe their only one) "*That the law is indiſputably againſt* "*us*," we ſhould not wiſh to urge this reproachful queſtion, whether every good member of a community is to preſcribe to himſelf no rule ſuperior to that of *law*; or whether the ideas of right, and wrong, have no other foundation but that of ſtatutes in theſe caſes made and provided; but this we may aſk, where is this law to be found? does it ariſe from any act of parliament, any ſtatute, any ſolemn determination of any one caſe ſimilar to this, which has been carried through all the inferior courts to a ſuperior one? whence ariſes it, that if any counſeller is obliged to ſpeak on this

principle,

principle, as a law queſtion, he can produce no written authorities, no quotations from any of our Engliſh law books, or records, but muſt ſubmit to the mortifying neceſſity of deducing our Engliſh laws from a Sweediſh Civilian, and even from him, no one principle can be drawn which is in the leaſt applicable *to an owner's abſolute warrantee of a ſhip's ſufficiency*; for all the obſervations hitherto produced from Grotius, on the nature of a fair contract in buying, and ſelling goods, *&c. &c.* whoſe *real condition* may, and ought to be known by the ſeller, however reſpectable they may ſound when quoted in Latin, would appear to all men, if in plain Engliſh, nothing to the purpoſe.

Is there any other ſenſe of the word law, as applied to inſurance caſes, but this, *The opinion which the different courts have given of the rules which ought to be followed amongſt merchants, which opinion itſelf has been collected from the judgement of the ſeveral ſpecial juries, which have ſerved on particular trials.*

If then the law is to be aſcertained by theſe opinions, are we to include all the opinions given, or only ſome of them? Is it to be determined by old and long obſerved precedents, or only by later ones? If the majority of opinions is to determine in this caſe, we have two clear determinations for us, to one only againſt us. If any caſes, exactly ſimilar to ours have been given in favour of the underwriters, why are not theſe caſes fully ſtated, and their ſimilitude illuſtrated? the only inſtance which has hitherto been ſpoken of, as given on this principle againſt a ſhip owner, was a ſhip which ſailed from London, and was condemned at Portſmouth,

mouth, as being incapable of any repairs at all, even though admitted into the king's dock, which is a caſe ſo totally different from ours, that though the compariſon has been inſinuated in general terms, yet the council for the underwriters have not ventured to purſue it, becauſe they muſt be fully convinced, that it has not the leaſt reſemblance to our caſe. Beſides, even this was a caſe which had but one determination, and on what principle is it that a ſingle determination, becauſe of a late date, is to outweigh all the preceeding ones, which may have been oppoſite to it?

Thus far we have conſidered only the general principles of inſurance, and the judicious reader will of himſelf apply theſe principles to moſt of the objections which have been urged againſt our particular caſe. But, beſides all this general reaſoning, which we apprehend to be in our favour, we think that there are ſome circumſtances in the particular caſe of the Mills Frigate, ſo far as it reſpects the underwriters on our policy, which give additional ſtrength to our claim.

We reaſon, that whatever ſeverity of conſtruction may be given to any general principles, yet that this particular caſe is an exception to every *general rule*, for the captain's letter (mentioned in the caſe as ſhewn to the underwriters) being annexed to the policy, muſt be conſidered as ſetting aſide every ſuppoſed warrantee, either in the letter or the ſpirit of the contract. The owners by ſhewing this letter muſt be ſuppoſed to ſay, *Gentlemen, This ſhip, though called as a matter of courſe the good ſhip, has met with ſome damage; the captain ſays he*

will make ſuch repairs as are neceſſary, and we doubt not but he will do his beſt conſidering the place he loads at. You well know that there are no docks in this iſland, but that ſhe muſt lye, till her ſailing, in an open road, and that ſhe can only receive ſuch repairs as are to be made whilſt ſhe is afloat: You know it too, to be the conſtant, the invariable cuſtom for ſhips in this trade to have but one fitting for the outward and homeward voyage, and therefore, though you now take only the homeward bound riſque, yet this is ſo far neceſſarily connected with the outward, that you can only form your opinion of this ſhip, from her character when ſhe went from London, and from the ſubſequent advice which this letter has given you: If you think that, under all theſe circumſtances fairly diſcloſed to you, ſhe is a proper riſque, the policy is before you, write it, or not. The reply of one of the underwriters, that *he believed ſhe would damage her cargo, and that therefore he preferred writing the ſhip*, is an irreſiſtable demonſtration that he did not, could not, conſider this ſhip as under any particular, or general warrantee from her being called *good* in the policy, but that he wrote her, depending only on its being a ſummer's voyage, rather believing her *not* to be a good ſhip, for no man can preſume to ſay that the apprehenſion of her damaging her cargoe could by any means conſiſt with an abſolute warrantee of ſufficiency.

Theſe full informations on the part of the aſſured, and theſe ſuſpicions on the part of the underwriters, being directly contradictory to any ſuppoſed abſolute warrantee, there muſt be an evident impropriety (to ſpeak of it in the ſofteſt terms) in now ſetting up the pretence,

that

that any ſuch warrantee was, in this particular contract, either expreſſed or underſtood.

There has been one objection made to the merits of our claim, which would have great weight, if, happily for us, it was not void of all truth, viz. *That it is a Fact, that though the captain promiſed that the neceſſary repairs ſhould be made at St. Kitts, yet theſe repairs were not made.* It is impoſſible to gueſs what could lead the gentleman to this ſtrange miſapprehenſion, eſpecially as he ſays he was preſent at the trial. The owners will only obſerve on this head, That this fact, as it is improperly called, is ſo far from being a fact, that there was expreſs evidence given in the court to the contrary, and that the underwriters themſelves have not *yet* inſtructed their council to urge it.

The ſame gentleman, unhappily miſtaking in almoſt every inſtance, the circumſtances which attended the Mills Frigate whilſt abroad, ſeems to flatter himſelf, that he has diſcovered ſome very important flaws in the captain's conduct, whilſt he was at Nevis and St. Kitts. He aſſerts *that the ſurvey was not legal.* The law, though remarkably copious, does not, as this gentleman imagines, preſcribe any particular rule, by which the planters of Nevis ſhall determine, whether they ought, in prudence, to put their ſugars on board any ſhip, or not. The planters had ſome doubts concerning this ſhip's ſufficiency, and not having the act of parliament by them to which this gentleman refers, they naturally followed their own beſt judgment, and told the captain; that if he would ſubmit to have his ſhip ſurveyed by all the captains then loading in the iſland, they would be determined by their report. It was the planters themſelves

ſelves who *propoſed* the captains for their ſurveyors, in preference to any carpenter *, becauſe they very well knew, that at a place where a ſhip was never built, and where the carpenters were chiefly employed in making or repairing boats, that *their* judgment or opinion of a ſhip would be of little conſequence, when compared with that of the ſhip captains. There could certainly be nothing illegal in this proceeding, it was on the contrary, the moſt juſt and natural method imaginable, that the very ſame gentlemen who ſtarted theſe difficulties, ſhould propoſe ſome methods, beſt approved of by themſelves, for removing them; and if the planters, who were intereſted in this matter, who were on the ſpot, and muſt therefore know the reſpective characters both of the captains and carpenters, if *they*, thus circumſtanced, fix on the one in preference to the other; it is much to be doubted, with what propriety any perſon at this diſtance, who cannot know any thing of the ſurveyors appointed, ſhould preſume to cenſure their method of proceeding, and ſo alertly to pronounce that *the ſurvey* (made to ſatisfy their own doubts) *was not legal*; for the captain himſelf was ſo fully perſuaded of the goodneſs of his ſhip, *after he had new nailed her at St. Kitts, all the way from the whale upwards*, that were he only to have loaded a cargoe provided for him by the owners, there would not have appeared to him the leaſt reaſon for any examination at all. And indeed, when ſhe was thus ſurveyed at the requeſt of the planters by the ſix captains, there was only one of the ſix, who thought that the ſhip wanted any kind of repair.

There

* *Therefore captain Finch requeſted the ſix captains to ſurvey her, as mentioned in our caſe.*

There have been ſome objections made to the valuation of the intereſt inſured, and it is very eaſy for any gentleman, who has not the particular accounts of a ſhip before him, to put down ſome imaginary calculations, and then work from them, as if they were real ones. He may firſt ſuppoſe a ſhip to come home ſafe, and then when ſafe arrived to be ſold as a wreck for juſt ſuch a ſum, and no more, as will beſt ſuit his purpoſe; he may alſo amuſe himſelf by calculating (as our good friend has done) how much the aſſured would have gained neat by this loſs, ſuppoſing that they had inſured four hundred pounds more than they really did inſure; and may enter into many ſuch peculiarities in aſcertaining the true intereſt of a ſhip, as will convince men, more than ever, how neceſſary it is, to abide by all valuations which appear to be fairly made. For what a ſhip ſhall actually ſell for in a port where ſhe is condemned, is no proof at all of her real worth, unleſs that port is a proper market for ſuch a ſhip; nor does it at all follow that a ſhip ſold at St. Kitts, where there is no dock, was ſold for what ſhe would have been worth at another place where there are docks. Beſides, in many of thoſe little places, there are few people whoſe buſineſs it is to be concerned in ſuch purchaſes as theſe, and for this reaſon it has often happened, that ſhips under ſuch circumſtances have been ſold for not a quarter their value.

Whenever any merchant inſures £ 700 on a ſhare which coſt him only £ 300, this may be a juſtifiable reaſon for attempting to open the policy: but whenever a merchant inſures only £ 300 on a ſhare which coſt him £ 700, it is a va-

a valuation ſo moderate, that it would prove an underwriter to be of a very cavilling diſpoſition, to attempt to ſet it aſide *.

Were it neceſſary to bring any authorities in ſupport of a method invariably purſued by all fair and honeſt men, there is a paſſage in Magens's Eſſay on Inſurances, which is to the preſent point.

" *The ſhares of ſhips ought to be preciſely va-*
" *lued in the policy when it is not their firſt*
" *voyage, becauſe it will be difficult to prove*
" *what may be their worth in ſubſequent voya-*
" *ges, or what is really loſt of their original va-*
" *lue by wear and tear*, and *as the underwriters*
" *receive a proportionate premium, it is but rea-*
" *ſonable that they ſhould be determined by that*
" *valuation, unleſs there ſhould be any appearance*
" *of fraud; but where the evidence of this is*
" *not plain and poſitive*, the aſſured ſhould have
" *the ſentence in his favour, though the real va-*
" *lue appeared to be a ſmall matter leſs than that*
" *fixed upon the intereſt.*"

And if theſe principles are not adhered to, there muſt be endleſs diſputes between merchants and underwriters, for it is no eaſy point to ſettle what a ſhip was really worth, after ſhe is loſt: and we find in the inſtance before us, that the very beſt judges will widely differ on ſuch a queſtion. For as to the Mills Frigate, the friendly unſollicited advocate for the underwriters, ſitting in his compting houſe, minute-

ly

* In this particular inſtance, the valuation of £ 300 for a fourth, is proved to be a moderate one, becauſe the owners had £ 1200 offered for this ſhip but a few months before her ſailing from London; and even after this they were at the additional expence of her laſt outfitt.

ly aſcertains the value of a ſhip he never ſaw, prophecies that ſhe would be a wreck though ſhe ſhould arrive ſafe, and be unworthy of rebuilding in the river of Thames; whereas, on the other hand, the captain of this ſhip, who had made many voyages in her, and who may be ſuppoſed to be ſome judge of her timbers, becauſe he had examined them, he determines, that ſhe might have been very well repaired, if ſhe had put into a place where there were any materials, and conveniencies for repair.

We, therefore, who rather look on the captain as the beſt judge of the two, are naturally led to admit his opinion, in preference to that of the other worthy gentleman; and, conſequently, we ſhall ſtill lay great ſtreſs on that *local incapacity* already inſiſted on, which, ſo far from being out of the debate, is abſolutely eſſential to it.

For when a ſhip has begun her intended voyage, and in the proſecution of it ſprings a leak, which obliges her, for the preſervation of the whole, to make for the neareſt port, the want of docks and materials, to enable her to ſail again from this port, is as real a deſtruction of the intereſt, to the owners, as if ſhe had ſunk before ſhe got into it; and whether the port into which ſhe returned, be the ſame from whence ſhe ſailed, or any other, has not the leaſt influence on this queſtion; for if the port into which the captain and ſailors are obliged to carry her, is a place ſo circumſtanced, that the ſhip can never return from thence, ſhe is, and muſt be, in conſequence of this ſituation, for ever loſt to the owners, and it has more the appearance of inſult than of argument

ment to ſay, *there is your ſhip again, how are you injured?* for the ſhip's being in that place, in which ſhe *cannot be repaired*, and from whence ſhe *can never ſail*, is the *very* prejudice to the owner's intereſt, from which they claim an indemnification, agreeable to both the letter and ſpirit of the contract, that their riſque *ſhall continue and endure untill the ſaid ſhip ſhall be arrived at her deſtined port.*

If this ſhip had put into any port in North America, ſhe would have been able to have proſecuted her voyage home, and two thirds of the expence of repairing her would have been recoverable of the underwriters, which is a point ſo well known as to admit of no diſpute. If it ſhould be thought that two thirds of the expence of repairs would, in this inſtance, have have been too great a proportion for the underwriters to have paid; it ſhould be remembered that this general rule (of taking off $\frac{1}{3}$ from any repair, to be borne by the owners, and allotting $\frac{2}{3}$ to be paid by the underwriters) will like all other general rules not hold good in every inſtance with the ſame exact degree of juſtice: $\frac{1}{3}$ is deducted from the repairs of a ſhip if ſhe has met with any accident only in her ſecond voyage, when it is a great deal too much; and therefore this proportion muſt alſo be adhered to at other times when it is too little, ſetting inſtances of one ſort againſt thoſe of the other, and following this fixed proportion as the faireſt rule on the whole: nor would the owners, if this ſhip had been repaired in America, have received a new ſhip for an old one, this is a ſtudied exaggeration of the circumſtances which a ſtrict attention to the evi-

dence

dence would, or ought to have prevented; for it does not appear that ſhe wanted *any* material repairs, excepting new nails and ſpikes, for all her timbers and planks were perfectly ſound.

And it muſt be obſerved, that throughout the whole courſe of this enquiry concerning the principle of inſurance, as applied to this ſhip, neither the underwriters, nor their advocates have ever juſtly diſtinguiſhed between the ſituation the ſhip appeared to be in, after due examination at the *time* in which the contract was made, and the unexpected ſituation ſhe was judged to be in, after the underwriters had begun the riſque, but wanted to be off from their bargain: they vainly flatter themſelves that events which ariſe in *July*, events unforeſeen, unexpected, and impoſſible to be avoided, may be juſtly applied to vacate a contract made in the preceeding *June:* they quote with great readineſs all the ſubſequent proofs, or preſumptions of inſufficiency, and contrary to every rule of evidence, and fair reaſoning, would infer, *that whatever is known afterwards, might, or ought to have been guarded againſt before* *.

* In our particular caſe there has been only a *preſumption*, not *a full proof*, of the ſhips real and abſolute inſufficiency. For when the captain ſays in that laſt letter on which the underwriters lay ſo much ſtreſs. "*That it appeared to the ſurveyors, appointed by the court of admiralty to examine her when* laying *at anchor, that the faſtenings of her bottom were entirely decayed and eat up by ruſt*, they could not mean *that appearance* which ariſes from obſervation or examination, becauſe the *faſtenings of the bottom of a ſhip cannot be ſeen and examined whilſt ſhe is afloat*; they therefore uſed the word appear, for *likely* or *probable*, and in this ſenſe the phraſe, *it appears to me*, is frequently uſed, thus, becauſe they ſaw that the iron bolts of that one plank (opened to their

Nay, what we are to expect if the preſent point ſhould be carried, is very indiſcreetly droped by the Gentleman who thinks himſelf an advocate for their principles; for, he ſays, "*That whether the aſſured does, or does not, order "every repair to be made on his ſhip, which the "underwriter himſelf, would, or could recommend, "if he had been the commander of that ſhip; yet, "if the adequate repairs are not done, the aſſured "muſt be the ſufferer.*" i. e. *let a man act for the beſt as far as human judgement and foreſight can reach; yet if any thing ſhall hereafter ariſe, which ſhall diſcover more than could have been known before, the underwriter is to take the advantage of this ſubſequent evidence, vacate the policy, and the aſſured muſt ſtand to the loſs.* A very proper principle this for any mere underwriter, who may be only ſollicitous to eſcape the payment of loſſes at any rate; but the gentlemen who have inſurance to make, muſt, and ought to be alarmed at ſeeing a principle ſo pernicious to commerce openly eſpouſed; and therefore notwithſtanding any objections which may be made to the clauſe againſt inſufficiency (objections which may eaſily be attributed to their proper cauſe); if the aſſured do not inſiſt on this exemption

their view, by its being ſtarted all the way fore and aft) to be eat out by ruſt; they concluded, or thought they had reaſon to conclude, that all the others were ſo too, but they never *ſaw them*, nor could they *poſſibly ſee them*; and that they were much miſtaken, even in this concluſion, may be thought probable from this circumſtance, that the ſhip has remained at St. Kitts ever ſince, and been uſed as an hulk: ſo that inſtead of admitting the ſhip to have been actually inſufficient, (a point which the underwriters never have proved, nor will ever be able to do) we ſhall only admit, that the ſurveyors only condemned her under a preſumption of her being ſo.

emption from an abſolute warrantee of ſufficiency, their policies will in many inſtances be uſeleſs, and their premium given to no purpoſe. Some objections there may be to every ſcheme which human prudence can ſuggeſt, but the true enquiry is not. *What Method will have no diſadvantages attending it, but what will have the feweſt?* and if all policies were to guard againſt every inſufficiency of a ſhip unknown to the aſſured, the general good would be much more benefitted by the ſecurity which would ariſe from this clauſe, than the underwriters would be hurt by any occaſional abuſe of it.

Thoſe gentlemen who wiſh to diſcourage the uſe of this clauſe, cannot ſeriouſly believe that determined villains would, or could poſſibly, receive from it thoſe advantages which they pretend to fear: they know too well, that if a man fitts out a ſhip with an intention of looſing her, he cannot do it without many ſuſpicious preparations, and many faithleſs accomplices, and ſuch are the happy bounds to human ſagacity, when it is applied to villanous purſuits, that even where the heart may be capable of contriving them; there is not perhaps one inſtance in a million, where the head is equal to the executing of them, in ſuch a ſucceſsful manner, as compleatly to guard againſt all the various chances of detection, which ſhall ariſe in conducting a plan ſo peculiarly full of dangers and difficulties, nor would ſuch a villain derive any new ſecurity from this clauſe; for it does not exempt the owner from repairing any defects which are known, or ſuſpected, but only from being reſponſible for ſuch as could not be known, and under every ſuch inſtance of

ſuſpected

ſuſpected fraud, the underwriters could proceed in their defence at law againſt the diſhoneſt owner, exactly in the ſame manner as they would have done, if this clauſe againſt inſufficiency had not been uſed; for, as we have already obſerved, *If an owner neglects to examine*, or *omits to repair his ſhip* (*which the ſhip builders, carpenters and ſailors cannot avoid knowing*) *it muſt, and always will, be underſtood by a jury, that the owner actually did know* THAT *which was in his power, and which it was his duty to know.*

It may therefore be again repeated, That whoever does not inſert in his policies this clauſe againſt inſufficiency, will never be ſecure in his inſurance, but he imprudently leaves to the underwriters, the perpetual, the fruitful chance, of availing themſelves of any ex poſt facto proof, or preſumption of previous inſufficiency, he permits them to reaſon back from ſubſequent evidence with the ſame degree of force, as if this evidence was, or could have been, received before.

A PRINCIPLE this, equally repugnant to all the LAWS of SOUND REASONING, to the DEMANDS of EQUITY, and the TRUE INTEREST of COMMERCE—and a PRINCIPLE which will in its conſequences be favourable only to thoſe gentlemen whoſe FORTUNES are to be made by the GLORIOUS PERPLEXITIES and UNCERTAINTIES OF THE LAW.